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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 742

TRANSIT CASUALTY COMPANY, et al.,
Petitioners,

vs.

SECURITY TRUST COMPANY, et al.,
Respondents.

BRIEF OF RESPONDENT SECURITY TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Order of Dismissal of the United States District Court for the Southern District of Florida is unreported, but appears at R.* 229-231. Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals' initial opinion is reported at 396 F.2d

*"R" refers to the printed record in the Court of Appeals.

803; its uncorrected opinion on Petition for Rehearing En Banc is reported at 399 F.2d 665; and its corrected Order on Petition for Rehearing is not yet reported, but appears at A2-A3 of the Appendix to the Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The original opinion of the Court of Appeals is dated June 28, 1968. Petitioners' timely petition for rehearing was denied on August 29, 1968.

QUESTION PRESENTED

Was it error to dismiss petitioners' complaints without prejudice for failure to obey a court order under the following circumstances:

The named petitioners filed two diversity damage actions in the district court below alleging that the suits were brought in their own behalf and on behalf of alleged classes consisting of certain insurance companies and other insurers; the members of the alleged classes who were of the same citizenship as respondent were not named as parties plaintiff; during the trial proceedings, the district court ordered plaintiffs to amend their complaints "so as to include as parties plaintiff all members of the alleged class who have retained counsel for the plaintiff to represent them in these two cases;" when this order was not complied with, the district court dismissed both cases with prejudice for failure to obey a court order; plaintiffs then appealed to the Court of Appeals, which vacated the "with prejudice" part of the dismissal and remanded the cases for entry of a dismissal without prejudice?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 41(b) provides:

"**(b) Involuntary Dismissal: Effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

STATEMENT OF THE CASE

Petitioners, as plaintiffs below, filed two suits in the United States District Court for the Southern District of Florida (R. 12-75, 261-284). The complaints sought to recover damages from the respondent, Security Trust Company, because of the latter's alleged mismanagement of McKinley & Company. McKinley & Company was alleged to have gone insolvent after entering into separate management agreements to act as manager for various insurers in the writing of certain types of insurance.

The named plaintiffs in each case were foreign insurance companies authorized to do business in Florida. In each case, plaintiffs sued "to their own use and to the use of" certain other insurers similarly situated (R. 12-13, 261-262). After some preliminary procedural sparring had occurred, the district court entered an order on September 14, 1966, which provided in pertinent part:

> "1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have retained counsel for the Plaintiffs to represent them in these two cases." (R. 179).

Events Leading Up To Order Of September 14, 1966

The events leading up to the order of September 14, 1966, are shown at R. 76-175. These events are fairly summarized in TRANSIT CASUALTY COMPANY v. ATKINS, (5th Cir. 1967), 372 F.2d 441, 441-442, where the Court of Appeals declined interlocutory review of the order, stating:

"The facts underlying both of these proceedings are: The complaints were brought by two named parties plaintiff and seek damages against Security Trust Company, not only for themselves, but presumably for the benefit of 24 other insurance companies allegedly similarly situated. The complaints did not state in what way the class members were so numerous that joinder of all was impracticable; nor was it alleged what questions of law or fact were common as between the defendant, Security Trust Company, and all the quasi plaintiffs; nor was it shown how a class action was superior to other available methods for the fair and efficient adjudication of the controversy. Security Trust, in its answers, specifically denied all allegation as to the alleged class claimed to be represented; denied that it was impracticable to bring all of the alleged members of the class before the court; and denied that the two party plaintiffs fairly represented the interests of the entire class. In the course of discovery, after answers were filed, the attorneys for Security communicated by letter with some of the 24 absent members of the alleged class seeking information as to their knowledge of having been named as members. The communications also concerned the taking of discovery depositions. Thereupon, the attorneys for the plaintiffs notified Security's counsel to cease and desist communicating directly or indirectly with the clients represented by them. They filed before the district judge a motion to enjoin and prohibit any such communication, and in that motion charged counsel for defendant with unethical conduct in attempt-

ing to communicate directly with the absent members of the class. Presented with a claim by the attorneys for the p'aintiffs that the attorney-client relationship existed between them and the non-party class members, and a charge of unethical conduct leveled at counsel for defendant, the Court had the problem of determining the jural relationship of the members of the class, not only to the plaintiffs but to each other, and to the subject matter of the litigation, as well as to the counsel for plaintiffs. In an apparent effort to assemble information to assist him in determining these relationships, the District Judge entered the order of September 14th. Plaintiffs argue that the writs should issue because the order requires the joinder of additional plaintiffs who are residents of the same state as the defendants, and that this will destroy diversity and will divest the federal court of jurisdiction.

Irrespective of the correctness of the order below, it is apparent that this case is not in an appropriate stage for appellate review. The District Court is in the middle of a housekeeping operation. It has not reached a determination of the merits in any respect, and the order here sought to be reviewed does not define the rights of any party. It is not clear what the precise effect of the order will be on the outcome of the litigation, nor what subsequent steps the court will take. Only the subsequent decree, either dismissing the case or permitting them to proceed as a class action, will define their rights. . . . "

District Court Proceeding After Denial of Interlocutory Appellate Review

After the Court of Appeals held it had no jurisdiction to review the interlocutory order, the district court granted petitioners additional time to comply with the order (R. 185-186). Finally, on May 9, 1967, petitioners amended their complaints in supposed compliance with the September 14th order, but merely added certain foreign corporations as named plaintiffs and named none of the Florida corporations they admittedly represented (R. 221-223). To add insult to injury, plaintiffs' counsel filed an affidavit to the effect that the unnamed Florida members of the class had "elected to remain in that capacity" (R. 228).

The Dismissal With Prejudice for Failure to Obey The Court's Order

The district court's Order of Dismissal provides in pertinent part as follows:

> " . . . 2. Notwithstanding the granting of two continuances to the plaintiffs to comply with the order of September 14, 1966, plaintiffs, in the opinion of this Court, have failed to comply therewith. The Amendment to the Complaint filed on May 9, 1967 in an effort to comply with the order of September 14, 1966, conspicuously fails to include three Florida corporations which the plaintiffs have represented to this Court, as well as the Appellate Court—the Fifth Circuit Court of Appeals—to comprise members of the alleged class which must be named pur-

suant to the Order of September 14, 1966, since they were legally represented by counsel for the plaintiffs. As argued by counsel for the defendant, a failure to name these corporations constitutes a failure to comply with the order of September 14, 1966.

3. This Court expressly notes that at the time of the hearing on this motion no determination had been made as to whether this action is properly maintainable as a class action. In this regard, the posture of this case at the time of the hearing was the same as when the order of September 14, 1966 was entered. This Court, then, as now, as noted by the Fifth Circuit Court of Appeals, was engaged in a 'housekeeping' operation with a view to determining whether this action is properly maintainable as a class action. A full and good faith compliance with the order of September 14, 1966 was also necessary in order for this Court to determine the jural relationships of all interested parties among themselves as well as their relationship to the subject matter of the litigation and discovery processes incident thereto.

4. The Amendment together with counsel's affidavit of compliance does not respond to the Court's order of September 14, 1966 and instead of facilitating a disposition of the matters set forth in the complaint it serves to frustrate and hamper this Court's effort to resolve the pertinent issues.

5. The Court expressly finds that the plaintiffs have failed to comply with the order of September 14, 1966 as they were ordered to do. It Is Therefore, Ordered And Adjudged, that this cause be and the same is hereby dismissed with prejudice pursuant to Rule 41(b) and that the Defendant, Security Trust Co. go hence without day with its costs as may hereafter be taxed upon motion. . . . " (R. 229-231).

Court of Appeal's Ruling That Dismissal Should Be Without Prejudice

In its initial opinion at 396 F.2d 803, the Court of Appeals states:

" . . . We agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice."

In its Order on Petition for Rehearing at 399 F.2d 665, the Court of Appeals states:

" . . . For rehearing, appellants urge two principle points, both of which deal again with the merits or demerits of the District Court's order in attempting to define the parties to be included within the appellants' class action. Again appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and, having found a failure of compliance on the part

> of appellants, the District Court's judgment of dismissal was affirmed with directions that the order be entered without prejudice as set out in our Per Curiam of June 28, 1968. This Court will not modify its previous ruling despite any Florida law claimed by appellants which may or may not bar a subsequent cause of action in any future suit. . . . "

Having had their cases dismissed without prejudice for failure to obey a court order, petitioners now seek review in this Court by petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with any decision of another Court of Appeals. Dismissals without prejudice for failure to obey a court order are expressly authorized by both Rule 41(b) and numerous federal decisions. Cf., 5 MOORE'S FEDERAL PRACTICE, Section 41.12, and cases there collected.

2. The decision below is correct and in probable accord with this Court's prior decisions. Compare: LINK v. WABASH R. CO., 370 U.S. 626. The orderly administration of justice would be replaced by complete anarchy if litigants could, with complete impunity, simply disregard all Court orders deemed erroneous. Cf., WALKER v. CITY OF BIRMINGHAM, 388 U.S. 307; CARROLL v. PRESIDENT AND COMMISSIONERS OF PRINCESS ANNE, __ U.S. __.

3. None of the questions petitioners purportedly raise are properly before the Court on the present record. All four questions "presented" in the petition relate to joinder under Rule 19 and class action procedure under

Rule 23. None of these matters were considered by the courts below because petitioners never complied with the September 14th order of the district court. Since petitioners now assert a denial of due process, it should be noted in passing that these constitutional issues were never raised in the lower courts.

4. Supreme Court Rule 23(4) provides:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

Petitioners have not stated the "Questions Presented" with the required "accuracy, brevity, and clearness". Nor have they accurately or fairly stated the facts. While they now claim their lawyers were never "retained by the Florida companies" and that such companies did not have to be named under the September 14th order (Petition, p. 7), they admitted the exact opposite in both the district court (R. 253, 229-230), and in the court of appeals below. At page 2 of their Brief for petitioner in the mandamus and prohibition proceeding before the court of appeals, the present petitioners stated:

> "On September 14, 1966, the trial Court sua sponte entered an order requiring that the complaint be amended so as to add as additional parties plaintiff all members of the class who have retained counsel for the plaintiffs to represent them in the case (Exhibit C). It is undisputed that four (4) of the companies whose joinder would be required under this ruling are Florida corporations." (R. 225-226).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, true copies of the foregoing were mailed to the attorneys for petitioners, SAMUEL J. POWERS, JR., ESQUIRE, First Federal Building, Miami, Florida 33132; and GEORGE P. BOWIE, ESQUIRE, 901 Washington Avenue, St. Louis, Missouri 63178, this _____ day of November, 1968.

_____